FILED
MAY 20 1976

No. 75-1519

In the
Supreme Court of the United States
October Term, 1975

MARTIN M. FAHEY,

Petitioner,

vs.

HOLY FAMILY HOSPITAL, an Illinois Not-For-Profit Corporation,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI To The Appellate Court Of The State Of Illinois For The First Judicial District, Second Division

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I.

FURTHER STATEMENT OF THE CASE

Petitioner misleads this Court when he says in his statement of the case that the "trial court . . . denied him a hearing on the diminishment of his surgical privileges without due process . . ." The trial court did no such thing. In fact, not only did it not deny Petitioner a hearing, it ordered the Hospital Governing Board to give Petitioner a full hearing as required by the Hospital By-laws. In its order of June 6th, 1973 (Appendix, 1-a) the trial court found:

"7. The rule sought to be enforced against Plaintiff results in a removal of an exemption in Plaintiff's favor and therefore is a reduction in privileges within the meaning of the Hospital's By-laws.

8. Being a reduction in privileges, Plaintiff is entitled to a hearing as provided for in the Defendant Hospital's By-laws."

Based upon the aforesaid findings, the trial court went on to order as follows:

"B. That the Defendant Hospital grant Plaintiff a hearing in the manner provided for in its By-laws for cases of reduction in medical staff privileges."

By this further statement of the case, Respondent wishes to correct any misunderstanding which may have resulted from Petitioner's statement of the case concerning whether or not the trial court denied Petitioner a hearing prior to the reduction of privileges. The exact opposite is true. The hearing was ordered, held by the Hospital and thereafter the rule in question was voted by the Hospital Governing Board to be enforced against Petitioner. No appeal or subsequent legal proceeding was ever brought by Petitioner from that subsequent action of the Hospital Governing Board.

II.

ARGUMENT

A. The Petition For Writ Of Certiorari Should Be Denied Because The Constitutional Question Of Due Process Is Now Moot.

Petitioner bottoms his argument that he was denied due process of law on the assertion that he was not granted a hearing by the Hospital Governing Board prior to the enforcement of the medical staff ruling against him. As can be seen from the further statement of the case, *supra,* the trial court found with Petitioner, and against the Hospital, that the rule enforcement was a reduction in privileges and, therefore, required a hearing before the Hospital Governing Board. The trial court ordered such a hearing to take place, and it did. Petitioner and his attorney appeared at the hearing and, after every opportunity to present evidence, which Petitioner did in fact do, the Hospital Governing Board voted to enforce the rule against him, all in accordance with the By-laws of the Hospital. That having occurred, it is clear that Petitioner was never deprived of any hearing to which he was entitled, and that, therefore, there was no due process of law. Any argument based upon lack of hearing is moot, the hearing having been given to Petitioner from which he has never filed any appeal or other legal proceeding.

B. The Petition Should Be Denied Because There Is Not A Federal Question Of Substance Involved In This Proceeding Which Has Not Heretofore Been Determined By This Court.

In *Hayman* v. *City of Galveston,* 273 U.S. 414, this Court held that a physician has no absolute right to any

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degree of medical staff privileges. From that and numerous other cases, both State and Federal, it is well established that governing boards in private hospitals have the right to determine what medical staff privileges may be granted, altered and revoked. Such determination has been made on numerous occasions in the Illinois courts including in *Selden* v. *City of Sterling,* 31 Ill. App. 455, 45 N.E. 2d 329 and *Dayan* v. *Wood River Township Hospital,* 18 Ill. App. 2d 263, 171 N.E. 2d 675. Accordingly, the vast majority of states follow the rule that, given the exclusive powers of private hospitals to determine all questions relating to staff privileges, governing board decisions relating to staff privileges are not reviewable by the courts. *Mauer* v. *Highland Park Hospital,* 90 Ill. App. 2d 409, 232 N.E. 2d 776; *Rutledge* v. *St. Vincent Memorial Hospital,* 67 Ill. App. 2d 156, 214 N.E. 2d 131.

Thus, it can be seen that there is no federal question of substance to be determined upon appeal to this Court. It is well settled that private hospitals may determine the extent of medical staff privileges, and the manner in which they may be revoked, suspended or altered. This case gives rise to no new factual situation or circumstance which would warrant a review by this Court, even if there was any fact from which it could be argued Petitioner was denied a hearing prior to reduction of privileges.

C. The Petition Should Be Denied Because The Hospital Was Not Involved In State Action Within The Meaning Of The Fourteenth Amendment.

It is clear that Holy Family Hospital, as a private hospital, was not engaged in state action to give rise to a federally protected right under the Fourteenth Amendment. As was stated by the United States District Court for the Southern District of New York in *Mulvihill* v.

Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (1971):

> "A private hospital is subject to the precepts of the Fourteenth Amendment only if its actions are tinged with some measure of state involvement. It is an uncontroverted principle that the action inhibited by the due process clause of the Fourteenth Amendment is only such action as may be said to be that of the states. . . . private conduct abridging individual rights does not violate the Fourteenth Amendment 'unless to some significant extent the state in any of its manifestations has been found to have become involved in it.'" (Citations omitted.)

In the *Mulvihill* case, the Court found that the involvement of Butterfield Memorial Hospital in Hill-Burton funds did not take it out of its scope as a private hospital, so as to involve it in state action for purposes of the Fourteenth Amendment. In that case, Plaintiffs were specialists in internal medicine and sued the hospital when the hospital voted not to reappoint the Plaintiffs. Plaintiffs argued that they were denied equal protection of the laws and due process because they were discharged without notice or a hearing. In distinguishing that factual situation from other cases, including *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959, 968 (4th Circuit) certiorari denied, 376 U.S. 938, 84 S. Ct. 793, 1964, the Court said:

> ". . . there is nothing in the language or logic of these cases to support the proposition that state action would have been present had the private hospitals in question discharged an employee without notice or a hearing. This is the conduct which is challenged in the present case, and the state is in no way involved in it."

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In the case at bar, the Respondent, Holy Family Hospital, is a private, Catholic hospital and, as such, is not an instrumentality of the state or otherwise involved in state action within the meaning of the Fourteenth Amendment. That being the case, Petitioner's due process argument is without merit.

D. It Is Not True That There Were No Medical Reasons Or Considerations Of Improved Patient Care Which Motivated The Enforcement Of The Rule Against Petitioner.

Contrary to the assertion of Petitioner under Point I of its Questions Presented For Review (page 2 of its Petition) there were sound medical care and patient care reasons for enforcing the ruling against Petitioner. For example, see the testimony of Sister Mary Amata Sweeney contained on pages 13 and 14 of the Petition. In particular, attention is called to that portion of her testimony contained on page 14 of the Petition as follows:

> "In my opinion, if Dr. Fahey were not required to follow the rule, I believe that the demoralization of the department of Gynecology and Obstetrics would continue, and that we might have to phase out those services. . . . I feel that the doctors so involved in this controversy cannot give the best possible patient care. I think there will be a loss of obstetrical and gynecologic cases at the hospital as well as in pediatrics. . . . The Department of Obstetrics and Gynecology has revived since the enforcement of the rule against Dr. Fahey. . . ."

Certainly, the motivation of the Hospital to enforce its rules uniformly, including against Dr. Fahey, the maintenance of a viable Department of Obstetrics and Gynecology, as well as the uncontroverted testimony at the trial court that this particular rule was recommended

by the American College of Surgeons, are reasons going to the improvement of patient care. Such judgments by private hospitals should not be disturbed by courts of review. As the Illinois Appellate Court observed in its opinion in favor of the Hospital (page 15a of Petition):

> ". . . the consultation rule which in this case only restricted Dr. Fahey's use of the facilities in Holy Family Hospital could be applied to him. However, on his first appeal, and on recommendation of the committee that heard him, the Board, although it did not have to, exempted Dr. Fahey from the rule. He enjoyed this exemption for more than two years when it was called to the Board's attention that the Obstetrics and Gynecology Department was not functioning properly because of uneven application of its rules. The evidence in the record suggests to us, as it must have to the trial judge, that the difficulties of the Hospital's Obstetrics & Gynecology Department resulted, in part, from the conflict caused by the exemption that had been given Dr. Fahey. As a consequence, the Board had to decide whether the rules of the department were to be uniformly applied to all members of the medical staff, or only to some. It decided on uniform application so that instead of danger to its continued existence, there could be assurance of proper and effective administration of the Obstetrics and Gynecology Department."

The Court went on further to state in its opinion as follows:

> "Dr. Fahey has argued in the trial court and before us that, as a result of his competence and high standing as a general and gynecologic surgeon, the Board could not remove his exemption from the consultation rule because there was no reason for the removal. Dr. Fahey insists that consultation requested by him, when discovered by his patient, demeaned him in the patient's estimation and would result in deterioration

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and ultimate loss of his professional practice. In our judgment, there is no substance to this argument.

"Without claiming special insight into the relation that exists between a surgeon and a patient who comes to him for a gynecological procedure, we are tempted to observe that clients of lawyers and patients of doctors have much in common. Whatever may be their differences, both professional relations depend in large measure on inter-personal candor, confidence and trust. For this reason, we believe that a patient in need of gynecologic surgery who was told, honestly and forthrightly, as Sister Amata requested to Dr. Fahey, that a Hospital rule requires the surgeon to consult with a qualified member of the Obstetrics and Gynecology Department before he performs a major gynecological procedure, will understand that explanation without any deterioration in her relation with the physician. This belief finds support in Section VII, Paragraph A of the Standards for Obstetric-Gynecologic hospital services of the American College of Obstetricians and Gynecologists . . ."

Following the guide of a *recent appeals court decision* in its circuit (*Klinge* v. *Lutheran Charities Association of St. Louis* [8th Cir., Aug. 4, 1975]), a federal district court granted the defendants' motion for summary judgment and held "that due process was provided both when plaintiff [physician] was placed on probation and when his status was reduced." Determinations by the hospital were based primarily on in-hospital and outside professional standards' review of a selected group of the physician's charts. Under these circumstances, the court rejected plaintiff's contention that he was constitutionally entitled to cross-examine witnesses against him. Such an opportunity "is not the law," said the court, citing *Woodbury* v. *McKinnon*, 447 F.2d 839 (5th Cir., 1971). "Further-

more," said the court, "it is apparent that this contention is inapposite herein as there were no witnesses to cross-examine." Nor was the court willing to reverse the hospital's decision and reinstate the physician to full staff privileges, because the hospital apparently failed to follow certain internal procedures that were unspecified in the opinion. *Kaplan* v. *Carney,* No. 74-600C(4), (U.S.D.C., E.D. Mo., Nov. 6, 1975).

The defendants "confessed the jurisdiction of" the court under 28 U.S.C. §1331 ("federal question" plus $10,000 or more) and §1343 ("color of state law" and/or 42 U.S.C. §1985). The district court's memorandum opinion recites a lengthy statement of facts concerning the various hearings and actions that resulted in the plaintiff physician's staff privilege reduction to associate status and a subsequent decision confirming such status. At points in the evaluations, the questions concerning the physician's professional competence were referred to an independently incorporated physicians' organization developed, in part, to conduct peer review.

The opinion stated, "The role of this Court in reviewing the actions of the Hospital is severely limited. . . . Plaintiff was not entitled to a full trial but only to reasonable notice of the charges against him and an opportunity to be heard with respect to those charges."

Relying on the appeals court's response to a similar argument in the *Klinge* case, the district court rejected plaintiff's argument that he was denied a determination by an impartial board. The hospital's executive committee and its board of trustees "constituted proper review boards." Also, "the independent review board [formed by the state's medical societies] found inappropriate use of medication, and insufficient chart documentation."

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Plaintiff also contended "that he was denied due process because there were no guidelines or objective criteria governing the standard to which he was held accountable." In support of this position, he also pointed, *inter alia*, to the outside group's "recommendation that the Hospital set up standards of performance." The court answered, "While it would perhaps be advantageous to have the Hospital establish definite standards, this Court is unable to conclude that the standards employed by defendants [which were not specified in the opinion] are so unreasonable, arbitrary, or capricious as to amount to a denial of due process. Precise standards of competency would be difficult to establish . . ."

Refusing to order the physician's reinstatement to full privileges because the hospital did not follow its internal procedures, the court said in part: "As has been noted repeatedly in cases of this nature, human lives are at stake. [Reinstatement of the doctor] is simply not justified under these circumstances. The Court is not saying the internal procedures are to be ignored with impunity; it is simply this Court's opinion that under the circumstances of this case, a reversal of the decision of the Hospital on this ground is unwarranted.

"It is not the role of this Court to substitute its judgment for that of the experts involved in this decision."

III.

CONCLUSION

For the reasons cited above, and upon the arguments and authorities contained in the foregoing, the Respondent, Holy Family Hospital, Inc., respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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